**N.D.A.G. Letter to Wild (Oct. 6, 1988)**

October 6, 1988

Mr. Steven J. Wild
Bowman County State's Attorney
P.O. Box 260
Bowman, ND 58623

Dear Mr. Wild:

Thank you for your letter dated August 11, 1988, requesting my opinion concerning an easement given by P. A. Harder to the State of North Dakota on September 7, 1934. I apologize for the delay in responding.

The analysis in this letter is based solely upon those facts that appear on the face of the copy of the easement you provided to me. I am unable to give an opinion as to the legal ability of P. A. Harder to grant the easement or whether the easement has been released in some manner. Also, as you can see from the discussion which follows, your request for an interpretation of this document requires the application of legal principles to a particular set of facts. As the Attorney General provides opinions only as to questions of law rather than fact, I am unable to provide you with an opinion. At best, I can provide you with general rules of construction concerning the meaning of the language in question.

The easement language apparently in dispute states as follows:

> And the undersigned does further dedicate to the State of North Dakota, for the use and benefit of the public, the said lands so occupied, used, or inundated, the waters impounded thereon through the erection of said dam, and so much of the lands adjacent to the waters impounded thereon as may be necessary to afford to the public full and free right of access to and use of said waters, and do surrender and dedicate to the State all rights of control over said dam and the body of water impounded thereby, forever.

(Emphasis supplied.)

Ms. Harder and the public apparently disagree as to the amount of land necessary for public access and the type of use which may occur on that land. Ms. Harder also disputes the existence of the easement

With regard to the issue of the easement's existence, the easement will continue until such time as it is extinguished or released. N.D.C.C. § 47-05-12 provides an easement may be extinguished by:

1. By vesting of the right to the servitude and the right to the servient

tenement in the same person;

2. By the destruction of the servient tenement;

3. By the performance of any act upon either tenement by the owner of the servitude or with his assent if it is incompatible with its nature or exercise; or

4. When the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by prescription.

From the information you have provided, it appears none of these activities have occurred and the easement has not been extinguished. As I stated above, I do not know and cannot give an opinion as to whether the easement has been released.

With regard to the rights provided by the granting of the easement, the following general principles may apply.

When an individual grants an easement to another party, a property right is transferred. See Powell on Real Property ¶406 (1987). The extent of the property interest transferred by the easement is determined in North Dakota by the terms of the grant or the nature of the enjoyment. N.D.C.C. § 47-05-07; see also Annot., 3 A.L.R.3d 1256 (1965). Whether a particular use of an easement is allowable is a question of fact. Radspinner v. Charlesworth, 369 N.W.2d 109 (N.D. 1985).

The phrase "full and free right of access to and use of said waters," which is found in the easement, is similar to language addressed in Cox v. Glenbrook Co., 371 P.2d 648 (Nev. 1962). In Cox, the Nevada court addressed the language "full right of use." The court held that, when interpreting an easement, matters relating to "the extent of the Privilege to use the easement" must be governed by the terms of the instrument itself. Id. at 655 (emphasis in original). Thus, the court determined the phrase "full right of use" to be clear and not the subject of interpretation.

On the other hand, the Cox court held that problems with regard to the width of way granted by the easement, if the width was not designated specifically in the instrument granting the easement, must be resolved by reference to the facts. Id. The court stated: "[P]roblems arising from the actual use of the way as distinguished from the privilege to use it, do not, in most cases, depend upon a construction of the conveying instrument, but rather upon the consequences resulting from such actual use. This being so, factual circumstances which arise in the future cannot be fairly determined now." Id. (emphasis in original).

The Cox case also supports the proposition that owners of an easement must use, maintain, and repair the easement in a manner which will promote the easement's purpose. Based upon the principles announced in Cox, use or failure to maintain or repair

may not cause an undue burden upon the servient estate or unwarranted interference with the independent rights of others who may have a similar right of use, and use must be confined to the area within the borders of the easement as the easement existed on the date it was granted. Whether or not the use by the public on the Harder property meets these standards is a question of fact.

In North Dakota, a similar principle has been espoused. In Minnesota Power Cooperatives v. Lake Shure Properties, 295 N.W.2d 122, 127 (N.D. 1980), the North Dakota Supreme Court stated the extent of express easements must be determined by reviewing the terms of the agreement. However, the court cautioned it may be necessary to look at customs and usage to determine what was meant by the agreement's general terms. Id. at 127 n.2.

In a Minnesota case concerning the right of the dominant estate to install docks upon lake shore property, the Minnesota Supreme Court held where an easement was granted in general terms, "the uncertainty must be resolved by applying the general principles of law relating to the construction of ambiguous rights." Farnes v. Lane, 161 N.W.2d 297, 300 (Minn. 1968). Extrinsic evidence concerning the intent of the parties might also be allowed to determine the extent of the easement granted. Id. The court expressed support for an "assumption the grantor intended to permit a use of the easement which was reasonable under the circumstances and the grantee expected to enjoy the use to the fullest extent consistent with its purpose." Id.

In conclusion, North Dakota law and the law of other jurisdictions requires the grantee of an easement to use the easement within the terms of the grant. However, when the grant is general in nature, the court must go beyond the express terms of the grant and review the circumstances surrounding the contract and the use of the easement. Since these matters involve the determination of factual situations, I cannot offer an opinion regarding the privileges of use granted by the Harder easement. I hope, however, the above discussion will be helpful to you in resolving this issue.

Sincerely,

Nicholas J. Spaeth

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